CASE NO. 80-1422

SUPREME COURT OF THE UNITED STATES
OCTOBER, 1980 TERM

LOHVLOHN H. REYNOLDS, :
:
APPELLANT, :
:
Versus :
:
HAROLD M. REYNOLDS, :
:
APPELLEE. :

ON APPEAL FROM THE COURT
OF APPEALS OF TENNESSEE
EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

COUNSEL OF RECORD FOR
APPELLEE
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TABLE OF AUTHORITIES

CASES CITED:

Orr v. Orr, 440 U.S. 268 . . .6,8,9,10,11

Mitchell v. Mitchell, 594 S.W.2d 699 . 6,7,8,9,10

STATUTES CITED:

Tennessee Code Annotated

§36-820. 2,6

§36-821. 2,6

§36-822. 2,6

§36-823. 2,6

§36-824. 2,6

§36-825. 3,4,7,9,10

§36-826. 2

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Rules of the Supreme Court of the United States, Appellee moves the Court for an Order dismissing this appeal on the following grounds:

(1) The appeal does not present a substantial federal question;

(2) The purported federal question was not expressly passed upon in this case;

(3) The judgment appealed from rests upon an adequate non-federal basis.

Alternatively, appellee moves the Court for an Order affirming the judgment sought to be reviewed on the ground that it is manifest that the purported questions presented are so unsubstantial as to need no further argument.

In fact, the issues as stated by Appellant are not genuine, but are spu-

rious. The Tennessee Code Sections of which Appellant complains (T.C.A. §36-820, 36-821, 36-822, 36-823, 36-824, and 36-826) were not invoked by either party to this suit, were not considered by any Court in reaching a decision in this suit and are totally irrelevant to the decision made in the State Court.

STATEMENT OF THE CASE AS IT PERTAINS TO THIS APPEAL

On December 9th, 1977 Mrs. Reynolds filed suit for divorce in the Circuit Court of Hamilton County, Tennessee. Mrs. Reynolds did not request alimony or child support (T.C.A. §36-820, 821, 822, 823, and 826). Mrs. Reynolds did not ask that "title to the homestead" be awarded to her (T.C.A. §36-824). Mrs. Reynolds made the affirmative request that the Court make an equitable division of the marital properties (T.C.A.

§36-825).

Mr. Reynolds filed an Answer and Cross action wherein he requested a divorce and likewise asked that the Court make an equitable division of the marital properties.

The case was bitterly contested at all stages of the proceedings. The trial lasted for three weeks and the record transmitted to the Tennessee Court of Appeals weighed 108 pounds.

The contested issues were largely factual and financial in nature.

Both parties had been previously married, no children were born of the marriage and the marriage was of comparatively short duration, six years. Incident to a sale of husband's business, wife persuaded husband to sign an agreement placing slightly over $3,000,000.00 in the name of wife and her daughter by a former marriage plus a promissory note

for $500,000.00 from husband to wife. As the Trial Court found, she fraudulently induced husband to do so by representing that she intended to place the funds in trust for the benefit of husband and wife. Instead she disappeared, filed suit for divorce and asked for an equitable division of what husband had left.

Following a three week trial, the Circuit Judge awarded Mr. Reynolds a divorce on his cross petition, set aside the agreement giving wife $3,000,000.00 and the $500,000.00 note as having been obtained by fraud, and divided the marital properties pursuant to T.C.A. §36-825 (Appellant's Appendix "B", page 95).

Mrs. Reynolds, together with her daughter, having received the total sum of $3,008,891.24 cash, the net effect of this was that Mr. Reynolds was awarded judgment against Mrs. Reynolds for

$1,008,891.24, thus leaving her and her daughter with $2,000,000.00. (Appellant's Appendix, page 95).

Mrs. Reynolds filed a Motion for a New Trial in the Trial Court. This Motion was not acted upon until August 23rd, 1979, four months after the statutes of which appellant complains had been amended to make them gender neutral. (Appellant's Appendix "C", beginning at page 101). Her Motion for a New Trial was overruled.

Mrs. Reynolds then appealed to the Tennessee Court of Appeals. By opinion entered September 12, 1980 the Court of Appeals affirmed the Trial Court (Appellant's Appendix "A", beginning at page 41).

Mrs. Reynolds then filed a Request for Permission to Appeal addressed to the Supreme Court of the State of Tenn-

essee. Mrs. Reynolds thereafter filed a Supplemental Request for Permission to Appeal with the Tennessee Supreme Court.

Both the original and supplemental Requests for Permission to Appeal filed by Mrs. Reynolds were denied (Appellant's Appendix "D", page 117).

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issues which appellant seeks to raise have already been considered and decided by the Supreme Court of the State of Tennessee in the case of Mitchell v. Mitchell, 594 S.W.2d 699, decided March 3, 1980. It was there held that T.C.A. §§36-820 through 36-824 and 36-826 were unconstitutional under the decision of the United States Supreme Court in Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306. In the same

case the Supreme Court ruled that Tennessee Code Annotated §36-825 was gender neutral and, therefore, constitutional.

The marital property of the Reynolds' was divided by the Trial Judge pursuant to §36-825. The Code Sections which were unconstitutional prior to their amendment to render them gender neutral played no role in the decision of this case. The unconstitutional Code Sections were not invoked or relied upon by either party and were not regarded by the Court.

Mitchell v. Mitchell, supra was decided by the Tennessee Supreme Court in March of 1980 some six months prior to the decision in this case by the Tennessee Court of Appeals. Obviously, had either the Tennessee Court of Appeals or the Tennessee Supreme Court felt that any of the unconstitutional Code Sec-

tions were material or relevant to the decision in this case, the Trial Judge would have been reversed and the case remanded as was done in Mitchell.

For the Supreme Court of the United States to accept jurisdiction in this case, it must indulge in the presumption that the Tennessee Courts applied statutes which the Supreme Court of Tennessee had already declared to be unconstitutional.

Thus, no substantial Federal question is presented, i.e., the highest Court of Tennessee has already recognized and followed Orr v. Orr. Similarly, the Tennessee Legislature has amended the non-conforming statutes to render them gender neutral.

For the United States Supreme Court to accept jurisdiction would place it in a positioin of doing nothing more than

rendering an advisory opinion upon a moot issue. As already stated in Mitchell v. Mitchell, Tennessee's "statutory scheme" except for T.C.A. §36-825 was unconstitutional prior to amendment by the Tennessee Legislature. These unconstitutional Code Sections were amended two years ago to bring them into conformity with Orr.

THE PURPORTED FEDERAL QUESTION WAS NOT EXPRESSLY PASSED UPON IN THIS CASE.

It is perfectly obvious that the Trial Court found it unnecessary to consider the constitutionality of those portions of the Tennessee Code which dealt with alimony, child support and homestead since these issues were not involved in the lawsuit. The Trial Court's opinion expressly stated that marital property was divided pursuant to T.C.A.

§36-825 which was and remains gender neutral.

Presumably, both the Tennessee Court of Appeals and the Tennessee Supreme Court felt it unnecessary to re-address the constitutional defects which existed in the Code Sections relating to alimony, child support and homestead prior to their amendment following the decision in Orr. These questions had already been addressed in Mitchell and, since these Code Sections were not involved in the decision of the Reynolds case, it was neither necessary nor appropriate that the Tennessee Appellate Courts reconsider these questions.

THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE NONFEDERAL BASIS.

The judgment entered in this case rests upon T.C.A. §36-825 which the Tennessee Supreme Court has previously held to be gender neutral in

conformity with Orr and therefore constitutional.

RESPONSE TO APPELLANT'S REASONS FOR PLENARY CONSIDERATION:

Appellant's attorneys before this Court are her fourth set of attorneys. They did not enter the case until it was before the Tennessee Supreme Court on Request for Permission to Appeal. Consequently, their unfamiliarity with the facts contained in this record is perfectly understandable.

Their conclusions, speculations and computations concerning the effect of the judgment upon Mrs. Reynolds are simply not supported by the record in this case. The simple fact of the matter is that Mrs. Reynolds (and her daughter by a former marriage) are left with $2,000,000.00 subject to the obligation to pay her pro-rata share of the income

taxes resulting from the sale of husband's assets which generated the cash that she received.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General of the State of Tennessee with three copies of this Motion To Dismiss or Affirm by depositing in the United States Mail copies of same in properly addressed envelopes with adequate first class postage thereon addressed thereto:

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This 16 day of March, 1981.

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